No. 7768

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEMP-BOOTH COMPANY, LIMITED, a corporation,
Appellant,

—VS.—

J. M. GALVIN, as Trustee in Bankruptcy of the House of Irving, a corporation, bankrupt,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

ADDITIONAL FACTS

We add to appellant's statement certain facts, omitted therefrom, which we deem material.

Insolvency of Bankrupt

Mr. Irving testified without reservation that at the time the bankrupt and appellant entered into the contract, the bankrupt was, and had long been, insolvent and remained insolvent until adjudicated a bankrupt (R. 80-81). The financial condition of the bankrupt was fully stated to Mr. Booth, president of appellant, before the contract was executed (R. 80). In November preceding the bankruptcy, appellant loaned to the bankrupt $100.00 to enable bankrupt to take up a

trade acceptance (R. 83). In July, 1930, the bankrupt was not able to pay bills promptly in course of business and Mr. Booth knew that fact when the agreement was made; "he understood the situation" (R. 86).

Mr. Galvin, the trustee, was formerly manager of Arnstein-Simon Co., a wholesale woolen house dealing with the bankrupt. In July, 1930, the bankrupt owed that company approximately $3,900.00 and at no time thereafter did the bankrupt pay its debts as they fell due. In October, 1930, Mr. Irving gave Mr. Galvin a statement showing liabilities of $18,229.00 and said that practically all of his accounts payable were past due. The excerpts from letters written by Mr. Irving to a creditor month by month during the year 1931 shows beyond any doubt the insolvency of the bankrupt for more than a year prior to adjudication (R. 98, 99).

The Open Account

The open account of $485.59 owing by bankrupt to defendant on July 26, 1930, the date of the consignment contract, soon increased to $1,500.00 (R. 82). During the year 1931 it averaged $1,500.00 (R. 69). This arose from goods sold outright on 30, 60 or 90 days credit (R. 71) and represented all but 25 out of the 122 charges found in Ex. 1 (R. 60-64). The first of these items is June 31, 1930, November 1, 7%, $229.60.

Insurance

The insurance policy insured House of Irving as the owner of the goods showing that title to the goods

was treated as having then passed from defendant to bankrupt; loss was payable to Kemp-Booth as its interest might appear as though defendant's interest was that of mortgagee or debtor for a balance of purchase price (R. 97-98).

Fraudulent Concealment

Bankrupt did not have exhibited on the premises anything to indicate that they were agents of Kemp-Booth (R. 79, 89). Neither letterheads nor bill heads stated that bankrupt was an agent of Kemp-Booth. Bankrupt did business exclusively in the name of House of Irving. Bankrupt never called the attention of a customer to the fact that Kemp-Booth claimed a lien upon the goods until they were paid for (R. 89). Bankrupt told no customers or creditors that they held goods on consignment. Mr. Irving testified that he considered all business transactions confidential, and that he did not consider it necessary to give the public or his creditors any information regarding his business (R. 89, 90).

Mr. Garrett testified that the bankrupt's alleged agency for defendant was not disclosed by anything on the premises. He said:

> "That is a thing ordinarily kept covered up by the tailors. We considered it confidential to the two parties to the contract. If another woolen house dealing with the bankrupt had made inquiry from us whether we had goods on consignment in the hands of the bankrupt it would have depended entirely upon circumstances whether the information would have been given. No

woolen house gives out that kind of information though it sometimes leaks out." (R. 79)

J. M. Galvin testified that during the life of this contract he asked and received from bankrupt a statement of its assets and liabilities at the instance of Arnstein-Simon & Co., a creditor to which the bankrupt owed $3,900.00. In October, 1930, Mr. Irving gave him a statement of his woolen stock as $16,234, but he did not mention that he held goods on consignment (R. 104). This was a fraudulent concealment.

James O'Connor, bankrupt's landlord, was frequently at bankrupt's store, and did not know that bankrupt held any goods on consignment, and never saw or heard of anything suggesting such a consignment. When the goods were removed from the store, there was $2,331.89 due on account of rent and services. Three other creditors testified that they had claims against bankrupt for services rendered after the date of the agreement and it was conceded by defendant that there were subsequent creditors (R. 45, 103, 104).

ARGUMENT

Appellant seeks reversal of the decree of the trial court in three particulars:

First: That part of the decree directing the defendant to reassign the remaining three accounts receivable.

Second: To the extent of $227.23 of that portion of the judgment, amounting to $905.50, collected by defendant on assigned accounts receivable.

Third: That portion which awarded recovery of the agreed value of the alleged consigned merchandise returned, $1,652.23.

Regarding the Three Accounts Receivable

About January 29, 1932, after receipt of the $600.00 which appellant concedes was preferentially paid, bankrupt was still indebted to defendant in the further sum of about $2,700.00, partly open account items dating back to May 11, 1931, and partly for merchandise used from alleged consigned goods. Bankrupt, not having the money to pay, but wishing, somehow, to pay defendant this amount, assigned certain accounts receivable of the bankrupt to defendant, the face value of which was $2,408.25, and on February 18, 1932, assigned certain other accounts receivable of the face value of $280.00. It was intended that this assignment of accounts receivable would pay the defendant's claim in full. But some subsequent charges and credits resulted in a small balance still owing to defendant of $43.83 (R. 64), though bankrupt's books show an overpayment of $9.40 (R. 95). At the trial,

$905.50 had been collected on these assigned accounts, and the court ordered judgment against defendant for that amount, and ordered that the remaining uncollected accounts be assigned by defendant to plaintiff. To the extent that these accounts were assigned as payment of an open account they were clearly preferential as appellant now concedes. Defendant complied with the court's ruling in part by assigning to plaintiff, before entry of judgment, all uncollected accounts receivable except three (R. 31-33). But defendant refused to assign over the said three accounts, and claims the right to hold them, on the theory that these accounts arose from the sale of clothing, by bankrupt, which was made up in part of cloth included in the alleged consigned merchandise

Plaintiff's Exhibit 2 (R. 65-66) shows that on the Thomas S. Allen account of $39.50 defendant has received $5.00; on the C. F. Lester account of $68.50 defendant has received $50.00; on the Lew Wallace account of $70.00 defendant has received $16.00. On these three accounts therefore defendant has collected $71.00 or 40% of $178.00 total, and claims the right to the balances aggregating $107.00. The value of the cloth used does not exceed one-third of the sales price of a suit (R. 91). Hence defendant has already received more than the cost of the cloth from the three accounts.

The most liberal interpretation of Clause Tenth of the contract contended for by appellant would not give the appellant an interest in any suit of clothes

greater than the cost of defendant's cloth that went into it. The record is silent in two points—1st, whether the cloth from these three suits came from Kemp-Booth and was part of the alleged consigned stock; and—2nd, the exact price of such goods; but it appeared from defendant's Exhibit A-11, received in evidence (R.102), that these three accounts were included in the twelve accounts (out of 35) based on Kemp-Booth Goods and that the cloth in the Lester suit was worth $16.24, and in the Wallace suit $12.90. Hence, upon what theory can defendant claim the right to hold the uncollected balance of these accounts. If not under Clause Tenth of the contract, then, only by virtue of the assignment. The uncollected balance of these accounts under Clause Tenth belonged to bankrupt, and passed to the plaintiff trustee. The assignment of these accounts to pay other indebtedness of bankrupt was a clear preference as to the uncollected balance of these three accounts, even if we adopt appellant's theory of the case.

Regarding the $227.23 Item

Regarding the $227.23 item, it is appellant's position that the judgment of the trial court should be reversed to the extent of $227.23, out of the $905.50 awarded by the court, as the amount of the actual cash collected by the appellant on assigned accounts receivable and retained by them. Appellant concedes that as to the balance of the $905.50 they are not entitled to a reversal.

Appellant concedes that if they have any right at

all to retain this money it must be found in paragraph Tenth of the contract. We respectfully submit that there is no language in this paragraph which, by any forced construction, could even be logically contended to support the position of appellant. Paragraph Tenth provides that the bankrupt might use these pieces of woolen cloth which are alleged to have been consigned, to make garments, and then says, "but in such case the title to all such garments shall remain in the party of the first part."

It appears from the testimony that the making of a woolen suit pattern into a suit of clothes for a man makes it necessary that it be cut up into about twenty-three small pieces which destroys its identity, as a piece of woolen goods, destroys its value as a suit pattern, and that after that it has little or no value unless built into a suit for the particular individual whose body it will fit Such construction of a suit requires that there be added to these small pieces of woolen cloth an equal number of various materials called trimmings or tailor's findings, and a considerable amount of labor, so that a suit which sells for $100.00 is made up of woolen which cost the tailor about $25.00, findings $6.00, labor $35.00, and that the balance of the $100.00 represents overhead expense and profit. In short, the value of the woolens going to make up a suit represents only one-fourth of its actual value.

Paragraph Tenth proceeds to say that, on the sale of any or all such garments, the party of the second part shall receive and retain for their services and

expenses in making up such garments, such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise. In other words, reducing these provisions to figures, on the sale of a $100.00 suit, Irving should receive $75.00 to cover his findings, labor, overhead and profit, and Kemp-Booth should receive $25.00 the assumed value of the woolens. The provision in regard to commission can be ignored here because both Mr. Garrett and Mr. Irving testified that no commission was ever paid or intended to be paid (R. 109, 97).

The provision above quoted that the title to all such garments shall *remain* in the party of the first part is, to say the least, very inept, because no provision is made for *transferring title* to the findings or labor or the finished product, which is a suit of clothes, to Kemp-Booth, and, strictly speaking, the only title to property which could *remain* in Kemp-Booth would be title to the woolens.

It is appellee's theory of this case that the value as well as the identity of the suit pattern was destroyed when it was cut up; that there is no provision in the contract which transferred title to any other part of the suit to Kemp-Booth; that the phrase "title shall remain" was not calculated, nor was it effective, to pass title to either the other constituent parts of the suit or to the finished suit, and did not so transfer title, to the finished suit, to Kemp-Booth; that as a practical solution of the question title to the

goods passed when they were delivered to Irving with permission to destroy their identity.

But appellant must go still further than the foregoing to sustain its right to retain the proceeds of these accounts receivable. There is certainly no language in Clause Tenth which gives appellant any lien upon the finished suit, nor upon any account receivable, in a case where the suit was sold on credit. This paragraph evidently contemplated that suits should be sold only for cash, so that there could be an immediate and instant division of the selling price.

There was never any such division of the selling price in any instance. There was a check up and billing for goods used once a month. Even when suits were sold for cash the money was deposited in the general bank account of the bankrupt. Approximately one-half of the bankrupt's business was on credit (R. 89). As collections came in on accounts receivable they were deposited in this same bank account. There was no trust fund, at any time, in which were set apart the moneys which it was provided in paragraph Tenth should be paid to appellant. By the appellant's waiving such provision for a period of one and one-half years, it is submitted, that the parties abandoned this provision if indeed it had ever been intended in the beginning that it should be kept.

It follows then that the only authority on which appellant can claim the proceeds of assigned accounts receivable is the authority included in the assignment itself.

The contention, raised in appellant's brief, that

title to the manufactured article was in appellant, is not only unsupported by the testimony but is thereby negatived. Neither the bankrupt nor the appellant ever so contended, and both the bankrupt and the appellant, in the court below, declared, that the title to the finished product was in the bankrupt. Mr. Irving testified:

> "If a suit was made up and refused by the customer, we paid Kemp-Booth for the woolens. If I used the goods I paid for them and if the customer who got the suit failed to pay, it was my loss. * * * If a customer failed to pay when due Kemp-Booth did not extend the time. * * * We never assigned to Kemp-Booth our interest in a suit made up. We never reserved with the customer a lien in favor of Kemp-Booth. We never delivered any finished suits to Kemp-Booth, nor did they ever claim such suits under paragraph 10 of the contract." (R. 96)

Mr. Garrett, appellant's Seattle manager, testified:

> "We understood that when the consignment account was placed in Mr. Irving's store it belonged to us; that Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to his customer we did not own the suit. *We made no claim to the suit, but had a claim against him for the value of the goods.*" (R. 109)

Mr. Garrett's last statement above quoted appears to settle the question as to the rights of the parties on the sale of a suit to a customer by bank-

rupt. Kemp-Booth's claim for a suit pattern became an open account against the bankrupt, and we submit, that the very fact that appellant and bankrupt felt that an assignment of these accounts receivable was necessary, at the time they were assigned, and before this litigation was even thought of. is conclusive that it was the understanding of these parties, that these accounts receivable belonged to the bankrupt, whether they arose from Kemp-Booth materials or from materials purchased from other woolen houses, and that, therefore, these accounts receivable passed to the trustee, the appellee herein, and any moneys collected therefrom must be accounted for to him.

Regarding the 160 Suit Patterns

What we have said, we consider, disposes of the questions raised by appellant, with the exception of title to the patterns delivered by appellant to the bankrupt, and subsequently repossessed by appellant. A discussion of this question necessitates a somewhat thorough investigation of the law relating to consignment contracts, and the distinction made by the courts between a sale and an agency to sell; and between a contract of bailment, a conditional sales contract and an absolute sale.

This being an equity case the court will doubtless feel it necessary to read the testimony introduced at the trial, which, we submit, shows, that, regardless of the terms of the written contract between appellant and the bankrupt, it was the intention of the parties, as borne out by their conduct, over a period of

a year and a half, that these goods were delivered to the bankrupt by appellant, not for sale, but for only one purpose, namely, consumption, in the manufacture of men's clothing, which clothing was not to be returned to appellant, but, in every instance was sold to a customer of the bankrupt before the woolens were cut up, under a special contract to manufacture a suit of clothes to fit a particular customer; that appellant invested the bankrupt with all the evidences of ownership of said woolens; and, by this alleged consignment arrangement, filled the shelves of the bankrupt with up-to-date woolens, which bolstered up his credit and actually prevented his failure in business, or rather deferred such failure for a year-and-a-half, during which time at least four subsequent creditors, in large amounts, were created by the bankrupt; and that the return by the bankrupt to appellant, a few days before he closed his doors, and made a common law assignment for the benefit of creditors, operated as an actual fraud upon these subsequent creditors, at whose instance the trustee in bankruptcy, later appointed, is vested with authority to bring this suit for the benefit of all creditors to recover said goods or their value. In short, we state at the outset of our argument that we believe that the evidence shows that this agreement, *called* a consignment agreement with a reservation of title, *was a sham* to conceal an entirely different transaction.

Contract was a Sham

We adopt the analysis of the contract made by

counsel for the appellant, appearing on pages 3, 4 and 5 of the opening brief The contract contains ten paragraphs. The analysis of appellant and our comment thereon follow:

> "1. First party agrees during the life of the agreement to consign from time to time such of its goods to second party as are suitable for sale by first party to second party."

Mr. Irving testified :

> "The contract no doubt reads that I have the right to sell suit patterns, but I interpret the meaning of the contract to be that I could not sell any of their materials; that is, to sell it as material, because that was their business. I was not supposed to sell woolens and did not, either of theirs or any other. I was in the tailoring business and did not sell woolens to anyone. I never sold any of Kemp-Booth Company's woolens." (R. 90)
>
> "2. The value of said goods in the possession of second party shall at no time exceed $3000.00."

The amount of goods placed in the possession of the bankrupt by appellant and the amount of money owing by the bankrupt to appellant gradually increased, until, at the time appellant took possession of the one hundred and sixty suit patterns, immediately prior to bankruptcy, there was due and owing from the bankrupt to appellant $3,104.20 (R. 95), exclusive of the value of the one hundred and sixty patterns on hand. The patterns repossessed are stipulated to have been worth $1,652.23 at the time of the

trial, which was two-thirds of their invoiced value, or $2,202.97 (R. 109). The court entered judgment for $3,581.66 with interest and costs. The second paragraph of the contract was constantly violated by the parties.

"3. Second party shall receive such commission for selling the same as may be stipulated by first party."

Mr. Irving testified:

"No commission was ever allowed, paid or mentioned." (R. 97)

Mr. Garrett testified :

"We never paid him any commission. It was not contemplated." (R. 109)

"4. Second party shall account to and settle with first party on the first day of each and every month during the life of the agreement, at the sale price fixed by first party, for all merchandise covered by the agreement and sold during the previous month, less commission. Second party guarantees the collection and prompt payment on the first day of each month of the sale price of all merchandise sold during the previous month."

Mr. Irving testified:

"We never made a report of our sales of suits to Kemp-Booth, neither a list of customers, nor the price of sales. They never asked us to do so. (R. 91)

"Cash received from suits was deposited in the bank to the credit of the House of Irving. We

had no separate bank account in which we kept money for Kemp-Booth. For suits sold on credit we billed the customer on the House of Irving billhead. Moneys coming in on suits made from Kemp-Booth materials went into our general bank account. In this bank account we mingled the proceeds of all sales of clothing whether made up from Kemp-Booth goods or otherwise. The money that came in was ours. (R. 89)

"If a suit was made up and refused by the customer, we paid Kemp-Booth for the woolens. If I used the goods I paid for them; and if a customer who got the goods failed to pay, it was my loss. I was supposed to pay at the end of the month for materials used during the month. If a customer failed to pay when due, Kemp-Booth did not extend the time. They knew nothing about my affairs in that respect, nor did anyone else." (R. 96)

Mr. Garrett testified:

"We understood that when the consignment account was placed in Mr. Irving's store it belonged to us; that Mr. Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to his customer, we did not own the suit. We made no claim to the suit, but had a claim aainst him for the value of the goods." (R. 109)

No accounting was ever required, and settlement was not made on the first day of each month for

goods consumed. The bankrupt was billed on open account, and paid as and when he could.

> "5. Second party shall furnish first party a monthly inventory of the exact merchandise held by it for first party on the first day of the month, beginning September 1, 1930."

The evidence fails utterly to show that the bankrupt furnished appellant with any inventory whatever. He furnished no inventory, either on the first of the month, or, at any other time, and the only record kept was on the "control cards" of appellant; and when the periodic check-ups were made, suit patterns which were not in the possession of the bankrupt were charged on open account to the bankrupt.

> "6. Second party shall insure all the merchandise against loss by fire and burglary in policies running to first party, and keep the merchandise segregated from other merchandise on the premises."

No burglary insurance was taken out. The bankrupt's goods were insured against loss by fire in the sum of $3,000.00 in favor of the House of Irving and the loss, if any, payable to Kemp-Booth, as its interest might appear; otherwise to the insured. This is not an insurance policy running to the appellant. Mr. Irving testified that the goods were mingled with goods obtained from other sources, and, that it was impossible to keep them segregated. The only way to determine whether goods originated with appellant was to take down every bolt of the stock out of the shelves and check each piece of cloth by examining the tag affixed to each bolt (R. 91).

"7. Either party may terminate the agreement by giving three days' written notice, and at termination all of the goods of the first party in the possession of second party shall be returned to first party."

There was no termination of the agreement except the seizure of the bankrupt's stock by appellant, forming the basis of this litigation.

"8. First party shall have the right to check up and inspect and/or withdraw any or all of the merchandise at any time without notice."

This provision was never carried out, with the exception that periodically, and, at more or less irregular intervals, appellant sent a man to bankrupt's store to check the stock. While there was a constant exchange of merchandise, there were no withdrawals within the meaning of this section.

"9. The title to all such consigned merchandise shall remain in the party of the first part and second party shall have no title thereto, but the right to sell the same for the first party under the terms and conditions stated. Prices and terms on which the same may be sold are to be furnished from time to time by first party."

Mr. Irving testified that he never sold any of Kemp-Booth Company's woolens and that he interpreted the meaning of the contract to be that he could not sell any of their materials and he was not supposed to sell woolens, either those originating from Kemp-Booth or from other sources (R. 90). No prices and no terms on which the woolens furnished by the appellant were to be sold by the bankrupt were ever

furnished. The suits manufactured by the bankrupt were made for bankrupt's customers at prices agreed on between the bankrupt and each customer. Appellant was not interested in the price charged by the House of Irving for suits; did not fix the prices therefor, and had nothing whatever to do with them. The interest of the appellant was confined to receiving payment for the merchandise furnished at the invoice price (Testimony of James H. Garrett, R. 107; testimony of J. H. Irving, R. 91).

> "10. The party of the second part shall have the right, until otherwise directed in writing by the party of the first part, to make up any part or parts of said merchandise into garments; but in such case the title to all of such garments shall remain in the party of the first part, and on the sale of any and all such garments the party of the second part shall receive and retain for his services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein as well as the usual commission on such merchandise."

Title to the manufactured suits was never claimed by appellant. Mr. Garrett testified that Mr. Irving might sell a suit cut from the goods and deliver the suit to his customer; that when the suit was so delivered to a cutsomer appellant did not own the suit; and had no claim against the suit, but had a claim against the bankrupt for the value of the woolens used in the manufacture (R. 109). He also testified:

> "The net profit he made on the suit was to be

the commission. We never paid him any commission. It was not contemplated." (R. 109)

The appellant never at any time owned the materials going into and making up a completed suit. The woolen material so used did not constitute more than one-third of the price the consumer paid for the suit, and the remainder being composed of tailor's findings or trimmings, buttons, thread, labor, overhead and profit. Title to the completed garment could not *remain* in appellant, because it never vested in appellant.

The contract was not carried out between the parties in any essential particular; it did not meet, and could not be made to meet, the necessities of the business conducted between the bankrupt and appellant. Mr. Irving testified that he acted entirely under the tenth paragraph of the contract (R. 90), but the testimony is conclusive that neither the bankrupt nor appellant considered that paragraph operative, and neither of them complied with its plain provisions.

So the case discussed in the opening brief is not the case before the court. The contracting parties did not comply with the contract and never intended to comply with it, for at no time did the appellant attempt to exercise any of its rights thereunder and never did the bankrupt admit that appellant could exercise such rights. The case discussed in the opening brief is fictitious. Possibly it is what the case might have been, had the contract been entered into and carried out, in good faith, in its essential particulars; but the contract was never considered effective by the parties and both the bankrupt and the

appellant admit a course of conduct which negatives any possibility of the transaction being held by the court to be other than an absolute sale, insofar as the trustee in bankruptcy is concerned.

Quite a similar case is *Yarm v. Lieberman*, 46 Fed. (2d) 464 (466) (D. C. N. Y.), where the court, finding that the parties had ignored the terms of a contract which purported to be a consignment, held that it was a sale, and said:

> "Upon the whole case, it is believed that this contract was entered into solely to provide an excuse for the removal of merchandise in the event that the bankrupts should come to financial difficulties, and that it was not such an open and aboveboard transaction as should be permitted to stand in the face of the rights of creditors who did not resort to such methods in their dealings with the bankrupts."

We now proceed with the argument on the law points involved.

A Secret Consignment of Woolens to a Tailor for Consumption Is Not Possible in Washington

On page 29 of appellant's brief is contained the following frank declaration:

> "In fact, if the contract had provided that upon the manufacture of the suit the title to the manufactured garment passed to the tailor to be by him transmitted to the ultimate purchaser, the contract instead of being a contract of consignment and agency would have been a contract with an option to purchase. If this con-

tract is invalid then it is not possible for wholesale woolen houses to consign their merchandise to merchant tailors."

AT THE OUTSET OF APPELLEE'S ARGUMENT UPON THE LAW WE ACCEPT THIS CHALLENGE AND DECLARE IT TO BE OUR OPINION THAT IT IS IMPOSSIBLE, UNDER THE LAWS OF THE STATE OF WASHINGTON, FOR A WOOLEN HOUSE TO CONSIGN TO A MERCHANT TAILOR, FOR CONSUMPTION IN MANUFACTURING GOODS FOR HIS CUSTOMERS, WOOLENS UNDER A SECRET AGREEMENT WHICH SEEKS TO RESERVE TITLE IN THE WOOLEN HOUSE AS AGAINST SUBSEQUENT INNOCENT CREDITORS OF THE ALLEGED CONSIGNEE AND AS AGAINST A TRUSTEE IN BANKRUPTCY REPRESENTING SUCH CREDITORS. We take this position because Section 3790 of Volume 5 of Remington's Revised Statutes, Annotated, of Washington, provides:

> *"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all bona fide purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county*

wherein, at the date of the vendee's taking possession of the property, the vendee resides."

We call the court's attention particularly to the phrase "containing a conditional right to purchase." The evidence in this case, as well as the brief of appellant, settles beyond any question of controversy that title to these woolens vested in the House of Irving, and these goods were, by them, manufactured into suits of clothing, and title to the finished suits passed from House of Irving to their customers, in every instance, under a special contract of manufacture, which was made between House of Irving and the customers, before the materials for the suits were ever cut out, and to which contract appellant was not a party.

We contend that it was the intention of the parties that title to the alleged consigned woolens was intended to be passed from Kemp-Booth to House of Irving and from the House of Irving to the customers of House of Irving, and that it was never intended that House of Irving should be an agent for the transfer of title direct from Kemp-Booth to the customers. It follows, then, that if there was a contract, either written or oral, governing these woolens, that contract was a contract for the sale of the woolens to House of Irving. Whether it was an option to purchase or a sale outright under which the purchase price was not to be paid until the merchandise was actually used by House of Irving, it would nevertheless be *a contract containing a conditional right to purchase*, and unless filed within ten days after the taking of possession by the vendee, such sale would

be absolute as to subsequent creditors, which in the case at bar are represented by the trustee in bankruptcy. It was not filed within ten days, or at all. We respectfully submit that this case could be decided upon this point alone in favor of appellee without further consideration of authorities. The learned Trial Court based his decision in part upon this ground (R. 17).

The Contract Was a Sale For Consumption, Not a Consignment For Sale

The distinction between sale and agency to sell has been stated by courts and authorities.

> "The *essence of sale* is, as has been seen, the transfer of the title to the goods for a price paid *or to be paid.* Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The *essence of agency to sell* is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent."
>
> I Meacham on Sales, Sec. 43.
>
> "The recognized distinction between bailment

and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale. * * * The agency to sell and return the proceeds, or the specific goods if not sold, stands upon precisely the same footing, and does not involve a change of title. An essential incident of trust property is that the trustee or bailee can never make use of it for his own benefit."

Sturm v. Boker, 150 U. S. 312, 329, 37 L. Ed. 1093, 1100.

This rule of distinction was later reaffirmed in the case of *Luvigh v. American Woolen Co. of N. Y.*, 31 A. B. R. 481, 231 U S. 522.. In that case woolen goods were consigned to an agent for sale. The proceeds of sale were to be accounted for. The consignor kept a bookkeeper in the consignee's office to see that the agreement was kept. The court found that there was neither actual nor constructive fraud and that the agreement was a consignment as it purported to be. The consignee was a legitimate jobber of woolens, not a tailor consuming the woolens as in the case at bar.

"To constitute a sale, there must have been in the contract a vendor and a vendee, and a

> provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor, *or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale.*" (Italics ours)
>
> *Gen. Electric Co. v. Brower*, 34 A. B. R. 642 (648) 221 Fed. 597 (602) (9th Cir.).

In that case the agent was required to transact business openly as agent for the manufacturer, account for the proceeds of sales less a discount agreed upon; the goods consigned and sale prices to be determined by consignor. The court found that there were no circumstances outside the contract of a fraudulent character.

The case of *Miller Rubber Co. v. Citizens etc. Bank*, 37 A. B. R. 542 (546) 233 Fed. 488 (491) (9th Cir. 1916) involved a contract which, on its face, was denominated a consignment of rubber tires. The agent was not only permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignors would furnish the consignee "free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of consignee." The court reaffirms the rule above quoted from *Gen. Elec. Co. v. Brower* (*supra*) and held:

> "It is difficult to see how the consignors could have more effectually held the consignee out to its customers as the real owner of the consigned

> property. To permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would, in our opinion, operate as a fraud on the creditors of the bankrupt."

The court held that these and other circumstances found in the case showed that the contract was a fraudulent concealment of an actual sale. Among such were failure of consignor to fix the resale price and provide for remittance by consignee of proceeds of sales; but instead consignee was to pay a fixed price for the consigned merchandise as same was resold.

In re *King*, 45 A. B. R. 95, 262 Fed. 318 (9th Cir. 1920) this court reaffirmed the rule laid down in above cited cases and affords two instances of consignments of rubber tires which were handled throughout as consignments should be handled "and there was no act of the consignor that can be properly held to have enabled the consignee to commit any fraud upon the public."

It appears, therefore, that in determining whether the transaction in the case at bar is a consignment or a conditional sale, our inquiry must extend not only to the terms of the written instrument but also to the circumstances outside the written contract and the conduct of the parties thereunder.

Tests Showing Consignment or Sale

Despite the many cases where the courts have had to determine the question whether a transaction was a consignment or a sale there has been no formula

worked out which has been accepted as a universal test for all cases. Many partial tests have been applied and adopted by the courts. Often the facts of a transaction have some elements pointing to a consignment and others indicating a sale. When conflicting elements are present the courts are forced to decide what was the dominant purpose of the parties. The following appear to be the tests deemed most important by the courts:

Elements of Relationship Which Point to Consignment Points or Earmarks	Elements of Relationship Which Point to Conditional Sale Points or Earmarks
1. Reservation of title, bona fide, Title passes directly from consignor to purchaser.	1. Reservation of title for purpose of securing the debt. Title passes to alleged consignee and from him to purchaser.

Reservation of title in consignor or alleged consignor is so universal in both classes of cases that it is not considered as a test but is almost taken for granted. If such reservation should be absent the omission would be fatal to claim of consignment. If present it is not conclusive, but the court will inquire into the other features of the case.

2. Restriction on sales either (1) to a prescribed class of persons or (2) in a prescribed territory, or (3) for prescribed prices, or (4) for cash only, or (5) as to terms of credit, either open account or notes.	2. No restrictions usually.

3. Upon termination of contract all unsold goods to be returned to consignor under all circumstances.	3. Alleged consignee may agree to either (1) pay for the unsold goods or give note, or (2) have option of paying for goods or returning same. Sometimes return of goods settles the debt; sometimes the goods are resold and if they bring a less price the alleged consignor has to pay the difference.

Mere agreement to return goods is equally consistent with either consignment or conditional sale, with reservation of title to secure purchase price.

4. Reports of sales made at stated intervals by agent to principal giving names and addresses of purchasers, sales prices, terms, etc.	4. Total absence of such reports or bare reports of sales without any details as to identity of purchasers or sales prices or terms or failure of alleged consignee to insist upon compliance with such a provision.
5. Reservation in consignor of title to any moneys, accounts, notes, etc., resulting from sales, as trust funds.	5. Total absence of such reservation or failure to insist upon compliance with such a provision.
6. Accounting at stated intervals by agent to principal for all proceeds of sales either turning cash and notes and accounts over to principal or making other satisfactory accounting therefor.	6. Payment from time to time by alleged consignee to alleged consignor of money in lump sums similar to payments made to other creditors.
7. Consigned goods kept separate from other goods of agent.	7. Alleged consigned goods mingled with other goods of alleged consignee.

8. Proceeds of sales of consigned goods kept separate from the other moneys of agent and held as separate fund in trust for consignor.	8. Proceeds of sales of alleged consigned goods mingled with other moneys of alleged consignee with knowledge of alleged consignor. Remittances made to alleged consignor out of these mingled moneys. Also other creditors and expenses of business paid out of said mingled funds.
9. Business done by consignee openly as agent of consignor. Public generally, customers and other creditors given notice by signs on premises, stationery bill heads and correspondence and/or instrument of record gives constructive notice.	9. Agreement is secret. Public not given actual or constructive notice. Alleged consignee deals with public, other creditors and customers as though the alleged consigned goods were his own. Alleged consignor acquiesces.
10. Agent sells goods for a price fixed by his principal and he has no discretion as to fixing price or terms of credit, etc.	10. Alleged consignee sells for any price he sees fit. He has to pay alleged consignor a fixed price for the goods sold. He determines the terms of credit he will extend and to whom credit will be extended. He pays for the goods sold at stated intervals regardless of whether he has collected the purchase price.
11. Agent usually receives for his compensation a commission computed on actual sales and remits the balance of moneys collected to his principal. Sometimes there is a division of profits in lieu of a fixed commission.	11. Alleged consignee usually pays a fixed price for the goods. If he sells for more or less than this price he enjoys the profit or bears the loss. If a credit customer does not pay he stands the loss.

12. By frequent check-up of goods and insistence upon agent's compliance with all the terms of the trust or by constant supervision, such as keeping a bookkeeper on the premises, the relation of principal and agent is preserved and principal's control of goods and proceeds is maintained.

12. Either there is no intention of the parties to create and preserve the relation of principal and agent and a trust as to the goods and their sales proceeds, or the parties neglect to preserve such relation and trust.

Mere check-up on reported sales is equally consistent with either consignment or sale on extended credit with reservation of title to secure purchase price, where the goods are to be paid for as fast as they are resold.

13. The consignor bears the burdens of ownership such as freight, expressage, taxes, insurance, depreciation, and assumes the risks of fire, theft, bad credits, and loss from sale below original invoice.

13. The alleged consignee is usually required to bear some or all of these burdens and losses.

It is not necessary that all of the earmarks of a sale be present to make it a sale; nor all of the earmarks of a consignment to make it a consignment. The presence or absence of one or more of these earmarks is merely evidence which should be given weight. In most of the cases there are some elements indicating a sale, and also some indicating a consignment. Where the evidence is conflicting it has sometimes been difficult for the court to determine on which side the evidence preponderates.

There are three of the so-called tests which are not real tests at all, because they are invariably pres-

ent in every contract of consignment and in every contract of conditional sale. These tests are:

1. Reservation of title.
3. Return of goods if not resold or paid for.
12. Check-up on reported sales where the goods are to be paid for as fast as they are resold.

But where every one of the ten other real earmarks of a consignment are missing and every one of the ten real earmarks of a sale are present, as is the case here, and where the goods are not even intended for sale by the alleged consignee, but for consumption by him, or manufacture into an article to be sold by him and not returned to alleged consignor, we submit the evidence is all one way and supports the decision of the learned Trial Court that this was a sale and not a consignment.

Hence we shall not attempt to take up, case by case, the authorities cited by learned counsel for appellant, showing that the courts have sustained agreements, as consignments, where one or more of these ten earmarks happens to be missing, but content ourselves with the observation that, in every case where the court held the transaction to be a consignment, there appeared to be a clear preponderance of evidence supporting the theory of consignment, and not a total absence of such evidence, as in the instant case.

Earmark or Point I—Reservation of Title

There was no valid consignment of the suit patterns returned. This was a conditional sale. The secret reservation of title in Kemp-Booth was a constructive

fraud upon subsequent creditors and not enforceable against the Trustee in Bankruptcy,

The Trustee in Bankruptcy is vested by law with the rights of subsequent execution creditors to recover property or its proceeds transferred in fraud of such creditors, although his recovery would be for the benefit of creditors generally.

In re Sachs, 30 Fed. (2d) 510 (515) (C. C. A. 4th Cir. 1929);

In re Moore (C. C. A. 4th) 11 Fed. 2d) 62;

Globe Bank v. Martin, 236 U. S. 288, 35 S. Ct. 377, 29 L. Ed. 583;

Ludvigh v. Amer. Woolen Co., 231 U. S. 522, 58 Law Ed. 345.

The courts uniformly hold that, in determining whether the contract was one of agency or consignment or bailment, on the one hand, or of sale, with reservation of title, by way of security, on the other, the courts will be *controlled* not by the terms of the contract, which is often found to be a cloak to conceal the real intention of the parties, and to mislead creditors, but rather the court will take into account (1) the contract the parties intended to make, (2) what they agreed to do, and (3) what the parties actually did, either in living up to the terms of the contract, or otherwise.

All these elements, considered together, will reveal the actual nature of the transaction.

> "There is no particular magic in the term 'consigned' or 'consigned account.' In a sense all goods shipped to another are consigned to

him. The question is what was the inherent character of the transaction, which depends upon the purpose of it. Were the goods put in the hands of the one party by the other, to be sold for him and on his account, creating the relation of principal and factor; or were they turned over to such party, to be treated and disposed of as his own, being responsible to the other simply for the price? In the one case we have a trust or bailment, the goods throughout being those of the consignor or principal, as well as the moneys received from them. In the other there is a sale; the superadded condition, sometimes appearing, that the title shall not pass until the goods are paid for, amounting to nothing as a restriction upon it."

In re Wells, 140 Fed. 752 (Dist. Ct., M. D. Penn., 1905)

"In determining whether the contract was one of agency and consignment, on the one hand, or a sale with reservation of title by way of security, on the other, it is apparent from the decisions of the courts, and especially those of our own Court of Appeals, that no one test can be applied, but that each case must be carefully and separately considered. In the final analysis we must take into account what manner of contract the parties intended to make, what they agreed to do, and the manner in which they carried it out in actually working under it. All of these must be considered as an entirety, for the

purpose of determining the actual character of the transaction."

In re National Home & Hotel Supply Co., 226 Fed. 840 (844) 35 A. B. R. 139 (144)

"The question for consideration, therefore, is whether the contract is one of sale or of consignment for sale. The provisions of the contract are not entirely consistent with either theory. * * * Bearing in mind that the terms of the instrument do not fully support either contention, it is necessary to ascertain and give effect to the dominant thought, regardless of formal statement, for the true nature of the transaction depends less on the terms in which it is described than upon the rights and liabilities it creates."

The District Court held the contract to be a sale.

In re Eichengreen (Dist. Ct. Md. 1927) 18 Fed. (2d) 101 (104).

On appeal the Circuit Court (4th Cir. 1928) affirmed the District Court, saying in part:

"While it is true that the paper writing is called a consignment, and that the bankrupt agreed to act as consignee, factor, or agent for the sale of the Shoe Company's merchandise, still the contract must be construed from a careful consideration of the entire language employed in the document, and the court is not bound by the name which the parties see fit to term themselves in the contract. It is less difficult to arrive at a proper construction by determining the benefits accruing and the burdens borne by the

parties." The court concluded that the contract could not, under the circumstances, be a contract of consignment.

Reliance Shoe Co. v. Manly, 25 Fed. (2d) 381 (383).

"In all the cases it is held that the relation of the parties as principal and agent or as vendor and vendee is determined by the nature of the transaction, and not by the name which they give it, and the use of the words 'agent,' 'commissions,' etc., is of little significance. If the goods are delivered to the 'consignee' under such circumstances as to confer upon him absolute dominion over them, and he becomes bound to pay a stipulated price for them at a certain time, or upon the happening of any future event, the transaction amounts to a sale and delivery, and the title passes to him."

Buffum v. Descher (Neb.) 96 N. W. 352 (353).

The future event in that case was resale of the goods, as in the case at bar it was the use of the goods in the bankrupt's business.

"The whole contract appears from the two papers: the one headed 'terms of consignment' and signed by Peek & Son, and the other headed 'consignee's agreement' and signed by F. K. Hill. It is true the words 'consignor' and 'consignee' appear sufficiently conspicuous, but these are merely labels which the parties have placed upon the transaction. We must look within to see its

real nature. * * * It is immaterial what the parties designate it."

Peek v. Heim (Pa.) 17 Atl. 984.

"Whatever the form of the agreement, if its purpose was to cover up a sale and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such object was no better than any other device."

Thompson v. Paret, 94 Pa. St. 275 (280).

Where, as in the case at bar, title passes from the consignor to consignee and from the latter to the purchaser, it is regarded as a dominant element. Reservation of title is regarded as for the purpose of securing the debt and the relationship is that of conditional sale, not consignment.

"It appears to me that the real question is, when Nevill sold the goods, did he sell them as the agent of Towle & Co., so as to make Towle & Co. the vendors, and the persons to whom he sold, purchasers from Towle & Co.?—or did he sell on his own account? * * * and no doubt it requires a very minute examination of what the course of business is, to distinguish between a *del credere* agent, and a person who is an agent up to a certain point, that is to say, until he has sold the goods, but who, when he has sold the goods, has purchased them on his own credit and sold them again on his own account. * * * I apprehend that a *del credere* agent, like any other

agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this, that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; and therefore, if he sells at the price at which he is authorized by his principal to sell, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time—in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different from those fixed by the contract. * * * He is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in

such a case is making, on his own account, a contract of purchase with his alleged principal, and is again re-selling." Mellish, Justice.

From *ex parte White*, L. R. 6, Chan. App. 397 (402-403).

"The distinction between sale and an agency to sell is ordinarily clear and simple, but, unfortunately, many cases are presented in which the parties, for the purpose of evading the operation of some local statute, of defeating the claims of creditors, or otherwise, have made contracts involving such a confused jumble of the elements of both sale and agency that it is exceedingly difficult to determine their true character. Certain of these contracts have evidently been framed for the purpose of concealing a sale under the guise of an agency, while others have been drawn with a view to having them construed as contracts of sale or agency as might best suit the convenience or subserve the purposes of the framers.

"In construing these anomalous instruments, courts look chiefly at the essential nature and preponderating features of the whole instrument and not at the peculiar form of isolated parts of it. It matters very little what the parties have chosen to call their contract. * * * If the parties have made a contract which really operates to transfer the title, it is a sale, notwithstanding they may have labeled it a 'special selling factor appointment,' or have expressly stipulated that the alleged factor 'shall never purchase such

goods for his own account.' So with regard to the use of the term 'consign': it may express the true state of the case, and, if so, it will be given effect; or it may be a mere subterfuge, and if it be the latter 'there is no magic in that word which can take from the transaction its real character'."

I Meacham on Sales, Sec. 46.

Such a secret contract of conditional sale, while it may be good, as between vendor and vendee, is void, as in fraud of subsequent creditors, or the Trustee in Bankruptcy.

The dominant idea behind the contract in the case at bar was a device for the extension of credit to the bankrupt. The inherent character of the attempted consignment was a sale of goods for consumption—cloth to be incorporated into garments—with a secret restriction that title should not pass until the goods were paid for. It is inconsistent with the continued ownership of the vendor. It is fraudulent and void as against subsequent creditors of the bankrupt. Where there is such a dominant idea behind a contract it is controlling.

In re Penny & Anderson (Dist. Ct. S. D. N. Y.) 176 Fed. 141 is a case nearly on all fours with the case at bar. In that case a stock of wines and liquors were "consigned" to bankrupts, who conducted a restaurant, for use therein. The agreement provided that title should remain in consignor until the full indebtedness of the bankrupts should be paid. There was no restriction on the sale of the liquors by the

bankrupts, as to price or otherwise, and no provision respecting the disposition of the proceeds.

Held, that the transaction was not a consignment but a sale, and the attempted retention of title in the seller void, as against creditors, and that claimants could not reclaim the property from the trustee in bankruptcy.

In the opinion of Dexter, Special Master, adopted by the court, it is said (p. 143):

> "I am of the opinion, and so report, that the petition should be dismissed, for the reason that the inherent character of the attempted consignment was a sale of goods for consumption, with a secret restriction that title should not pass until the goods were paid for, which is inconsistent with the continued ownership of the vendor, and is fraudulent and void as against creditors of the bankrupt."

Another court has said:

> "When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee."
>
> *In re Garcewich* (Cir. Ct. of App., 2nd Cir. 1902),115 Fed. 87 (89).

> "Contracts of sale, under which title is to remain in the vendor, although the vendee may consume the goods, or sell them and apply the proceeds to his own use, are fraudulent as to

creditors, because the stipulation that the title is to remain in the vendor is entirely inconsistent with the purpose of the contract."

Ludvigh v. American Woolen Co., 188 Fed. 30 (33), affirmed by Supreme Court in 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345.

"The purpose and intent of the parties and the legal effect as to third parties of what they agreed to do, may be best determined from the transactions authorized or contemplated to be performed by force of the terms and conditions of their contract. Thus construed, and its provisions considered in the same consecutive order as the acts under it were to be performed rather than in the order in which the provisions were incorporated in the agreement, we find: * * *"

Peoria Manuf'g Co. v. Lyons, 38 N. E. 661 (Sup. Ct. Ill.).

The *Laflin and Rand Powder Company v. Burkhardt*, 97 U. S. 110 (116), 24 L. Ed. 973, is a case in point:

Action in trover.

Certain acids and other articles were seized upon Burkhardt's execution issued on a judgment against Dittmar. Plaintiff recovered the value of the goods, so sold, in the lower court.

Dittmar was an inventor, and had the exclusive right, under patents, to manufacture certain explosives. He did not have the capital to carry on the manufacturing business. The Laflin and Rand Powder Company entered into a ten-year contract with

him to furnish certain money, each month, and the acids and other materials required to manufacture the explosives, or money to purchase same, they to be reimbursed for such advancements out of the sale price of the explosives, and any profits to be divided equally between them. The acids and other property seized by Burkhardt were nearly all articles furnished Dittmar under this agreement. The plaintiff claimed title on the theory that this was a consignment of raw materials to be manufactured by Dittmar and that title did not pass. The court said:

> "The plaintiff in error contends that the present is the case of a bailment, and not of a sale or loan of the goods and money to Dittmar. It is contended that a question of bailment or not is determined by the fact of whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law."

The agreement provided among other things that

the Powder Company is to furnish Dittmar, upon his requisition, all the raw materials needed to manufacture said explosives, or furnish Dittmar the money necessary for the purchase of said materials; the said advances and the cost of the raw materials are to be charged to Dittmar, against the manufactured goods, *to be consigned to the Powder Company.*

The court said:

> "The case is quite different from the single mechanical transaction of turning specific logs into boards, or a specific lot of wheat into flour." * * *
>
> "No one could lawfully use Dittmar's process for the manufacture of 'dualin' except himself. No one could lawfully sell it when manufactured, except himself. It was lawful for him to mix these materials and to produce the compound, but it was not lawful for the Powder Company to do so. It is, then, at least a fair argument to say that when materials were sent and delivered to him, to use in a manner which he only was authorized to use and to produce a result which he alone was authorized to produce, that both the process and the materials, when there was no stipulation to the contrary, should be taken to be his."

The court also said:

> "While it has been held that the expression 'to be consigned to the party of the second part' is not sufficient to show ownership in the party consigning, yet the general rule is conceded, that the party consigning goods is the presumed owner of them, and it may be taken into con-

sideration in giving construction to a doubtful instrument. In this transaction, as has been already observed, there is no agreement to return or deliver the goods, but the word 'consign' is evidently used in its place."

The judgment of the lower court was affirmed.

Where raw materials are delivered by one to another for manufacture it is a sale unless the finished product is to be returned to the one furnishing them.

In the case at bar the title to the woolens was attempted to be reserved in Kemp-Booth, but such reservation was inconsistent with the permission given House of Irving to manufacture these woolens into garments to be sold to its customers, such reservation of title being inconsistent with passing of good title to the purchasers, on sale of said garments.

In *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. A. 581, 584, 73 S. W. 1005, defendant owned a flouring mill, and, in connection therewith, an elevator in which wheat, of varying grades, was received from different owners, for storage, without charge, commingled in a general bulk, and taken out by defendant both for sale and for manufacture into flour. Defendant would return to depositors, at their option, wheat or its market value, or its market value in flour or bran, or cash, but no return of the identical wheat delivered was expected or made. Plaintiff and his assignors received slips of paper containing the name of the party delivering the wheat, the date, and the quantity delivered. The evidence showed that the plaintiff was to receive flour and bran for his wheat, and his assignors were to be paid, in cash, at the

market rate. The elevator and the wheat therein were destroyed by fire. Held, to constitute a sale, and plaintiff, in the lower court, recovered the value of the wheat.

It was contended, on appeal, that this transaction was a bailment. The court said:

> "It is well settled that where a warehouseman has received grain on deposit for its owner, in a common granary or depository, where it is mingled with other grain of himself or others, or both, in such receptacle, to which, from day to day, other grain of various owners, of like kind and quality, is added, and from which, from time to time, sales and delivery of grain are made, and the warehouseman keeps constantly on hand grain of the quality received, prepared for delivery on call to all depositors, the contract is a bailment, and not a sale. The circumstances that the identical grain is commingled with other grain, and is not to be returned to the depositor, but a like quantity of the same kind and quality are not sufficient to convert the contract into a sale (Citing cases). But the law is equally well settled, and supported by overwhelming weight of authority, that where there is no obligation to return the specific article to its original owner, nor to restore to him property of like quality, and the receiver is free to return another thing of value, he becomes a debtor, and owner of the property delivered. The distinction is thus recognized by the highest tribunal of America."

Then follows the quotation from the opinion of the

Supreme Court of the United States in the case of *Powder Co. v. Burkhardt*, beginning:

> "Thus where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper" etc.

above quoted. And after citing other authorities the court added:

> "In brief, the distinction recognized by the above and other authorities is that, to create the relation of bailor and bailee, it is imperative that the agreement, whether by express contract or implied by law, shall intend that the property received by the bailee shall be returned to the bailor."

We cite this case, not, as being in point with the case at bar, but as illustrating the principle of law that title to the cloth furnished by Kemp-Booth could not be reserved, in the form of the clothing, of which it was intended to become a part, unless it was the intendment of the agreement that the identical goods should be returned to Kemp-Booth in an altered form.

Such a bailment does exist where a tailor, like House of Irving, delivers the cloth, linings, buttons and all other materials necessary to make a coat, to a coatmaker, who puts the parts together and delivers them back to the tailor shop in the form of a finished garment. In that case the identical articles are returned by the bailee to the bailor in an altered form. The coat maker gets no title at any time to these materials. The law gives him a lien for his labor against the finished garment. The title to the materials remains at all times in the tailor.

If Kemp-Booth were engaged in the business of selling clothing, and furnished the materials to House of Irving for the work of manufacturing said materials into finished garments, the garments, when finished, to be returned to Kemp-Booth, we would have a clear case of bailment, and title to the goods would not pass the House of Irving.

But, in the case at bar, the goods were delivered to House of Irving with the intention that House of Irving might cut them up and consume them in manufacturing garments for the customers of House of Irving, adding thereto other materials belonging to House of Irving and making a finished product wholly different from the cloth furnished by Kemp-Booth. In the finished garments, so made, the cloth is so cut up that its identity is lost as woolen goods. It is impossible to retain title to an article when the person to whom it is delivered is authorized to mingle it with other articles, destroy its identity by cutting it into many pieces and manufacture it up into a garment which is designed to fit one particular person under a contract of manufacture to sell said garment to that one person.

In *Buffman v. Merry,* 3 Mason 478 (Cir. Ct. Rhode Island) 4 Fed. Cas. 604, cited by Cushman, Trial Judge (R. 21), A. delivered cotton yarn to H. under a contract that the same should be manufactured into plaids; H. was to furnish the filling out of other yarn belonging to him, and was to weave as many yards of plaids, at 15 cents per yard, as was equal to the value of the yarn, at 65 cents per pound.

Held, that by delivery of the yarn to H. the property thereof vested in him.

After delivery, and before manufacture, H. assigned to defendant for benefit of creditors. This was a suit in trover by A. to recover the yarn or its value.

Story, Circuit Justice. "My opinion upon this evidence is, that by the contract and delivery, the property in the yarn passed to Hutchinson. It was not a contract whereby the specific yarn was to be manufactured into cloth wholly for the plaintiff's account, and at his expense, and nothing but his yarn was to be used for that purpose. There the property in the yarn might not be changed; but here the cloth was to be made of other yarn as well as the plaintiff's, the warp of the plaintiff's yarn, the filling of the defendant's. The whole cloth, when made, was not to be delivered to the plaintiff, but so much only as at fifteen cents per yard would pay for the plaintiff's yarn at sixty-five cents per pound. What is this, but the sale of the yarn at a specified price, to be paid for in plaids at a specified price? Suppose after the delivery of the yarn to Hutchinson it had been burnt up, would not the loss have been his? Suppose after the plaids were manufactured, and before delivery of any part to the plaintiff, they had been destroyed, would the loss have been the plaintiff's? Certainly not. The plaids when manufactured would have been Hutchinson's and the plaintiff would not have been entitled to any part of them

before delivery to him in pursuance of the contract."

In the case at bar the cloth was not to be returned to Kemp-Booth even in its altered form, but something of equal value instead, namely money. If this distinguished jurist correctly defined the law applying to such a case, then the title to the woolens passed to House of Irving upon delivery, where the agreement contemplated their being worked up with other materials into garments.

In *Austin v. Seligman* (Cir. Ct., S. D., N. Y.) 18 Fed. 519, plaintiff delivered to the firm of Kempt & Co. certain jeweler's sweepings, to be refined, of the value of $4,292, and agreed to pay for the process of refining $320. It was agreed that the sweepings would be refined and the product thereof delivered to or accounted for, and the value thereof, less the agreed price for refining the same, paid to the plaintiff within 20 days from the delivery thereof. The court said:

"But the rule is well settled that when, by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the tranasction is not a bailment, but is a sale or exchange. Here the agreement was that Kempt & Co. should return the refined product of the sweepings or account for the value there-

of, less the price for refining. They had an option which was inconsistent with the character of a bailment. (Citing cases). The case is not one where they had possesison of the plaintiff's property under an executory agreement to purchase, but one where the title passed on delivery, unless the delivery was a bailment. *It was not a bailment if they had a right to return the money in its place.*" (Italics ours)

Chisholm v. Eagle Ore Sampling Co. (Cir. Ct. of App. 8th Cir.) 144 Fed. 670, was an appeal by a trustee in bankruptcy from an order allowing a preferential claim of the Eagle Ore Sampling Co. against the estate of General Metals Company, a bankrupt ore smelting concern. The court said:

"It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course of practice, when no controversy existed, is always to be given very great, if not controlling, effect.

"This is the way the business was conducted at the bankrupt's mill: Upon arrival a carload of ore which was given a number was weighed, and afterwards the empty car; the gross weight of the ore being thereby ascertained. (Follow details of taking samples). Now the remainder of the original lot of ore when crushed or rolled and ready for treatment was put upon the bedding floor of the mill and mixed with ore shipped by other parties. No attention was thereafter

paid by the claimant to its disposition by the bankrupt, nor was any attempt made to preserve its identity until payment upon the sample basis. It was then impossible to tell which was the claimant's ore and which the ore of others. * * * Again, settlements upon the sample basis were made by the delivery to the claimant of voucher checks. * * * In view of the foregoing, it seems clear to us that the parties acted under the contract as though the transactions were sales of the ore upon the basis of the assay values of samples. * * * Order reversed."

Jenkins v. Eichelberger (Pa.) 4 Watts 121, 28 Am. Dec. 691, is close to the facts of the case at bar. The reasoning of the court applies exactly to the facts of this case.

"Can we shut our eyes to the true nature of the transaction so as not to see that it was in substance a sale; and that the resale was a device to elude the wholesome principle of the common law, which forbids a lien to be created on chattels as a security separate from the possession? There is no reason why the vendor of the raw material should be secured to the detriment of the public, or in preference to the manufacturer; and if both can not be so, the contract must be construed in a way to make it consistent with rules of policy for the suppression of fraud, by uniting the ownership to the possession.

"* * * If the effect of the contract were even doubtful, the construction of it would be influenced by considerations of policy. To tolerate a

lien severed from the possession by any device whatever, would be pregnant with all the mischiefs of colorable ownership; and to sanction it at the expense of the community, could be justified but by the accomplishment of more important objects than individual accommodation. Policy and fair dealing require the courts to be as unsparing of transactions, whose effect is to impart a delusive credit or protect the property of debtors from their creditors, and to be as regardless of devices and forms, as they have ever been of transactions prohibited by the statutes of usury. The resources of ingenuity are inexhaustible; and to give entire effect to principles of policy, it is necessary to look at substance without respect to form. It is said that this species of transaction is so prevalent, that an immense amount of property will be affected by our decision. So much the more urgent is the demand for its suppression. If the dealers in raw hides themselves can not trust the tanners, they certainly can not expect that they will be suffered to secure the benefit of their custom by means which may induce other to trust them. Such were the means resorted to here; and whether the form of the action were well or ill chosen, it is sufficient for the purposes of the judgment, that the attempt to cover the property from the creditors of the vendee, is prohibited by policy and statute.

"Judgment affirmed."

In *Norton v. Woodruff*, 2 N.Y. 154, wheat was de-

livered to a miller who agree to give flour in return, a barrel of flour for each 4 15/16 bushels of wheat. The wheat burned before it was ground. Held, this was a sale and not a bailment.

> "The distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt, so recognized by the decisions in England and this state." * * *

The case of *Foster v. Pettibone*, 7 N. Y. 433, involves another case where wheat was delivered to a miller to be ground into flour and the identical flour returned. It was held to be a bailment. The earlier cases were examined and the rule laid down distinguishing between bailment and sale reaffirmed.

In *Ewing v. French*, 1 Blackfords Rep. (Ind. 1825) 353, wheat was delivered to a miller.

> "By the contract, flour was to be delivered in exchange for wheat. From the moment the defendants received the wheat, they became liable for the flour. There was no bailment in the case. The wheat itself was not to be returned, nor the identical flour manufactured from it. The wheat was thrown into the common stock of wheat in the mill belonging to the company, and flour was to be delivered in exchange. It was a sale of wheat to be paid for in flour."

The case of *Slaughter v. Green* (Va. 1821) 1 Randolph 3, 10 Amer. Dec. 488, was long regarded as a border line case. In that case wheat was delivered to a miller by several farmers "to be ground into flour." By custom and the necessities of the case the

wheat from the several bailors was mixed in a common mass. It was expressly found that there was in the mill, at the time of the fire, flour, etc., enough to satisfy all claims upon the mill for the same. It was held to be a bailment and not a sale since the bailee had no right to sell or dispose of either the wheat or the flour except so much of it as was agreed to be his for the grinding.

> "Where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of the trade, mixes the wheat in a common mass with the other wheat in his warehouse, and with the understanding that he is to retain or ship the same for sale on his own account, at pleasure, and, on presentation of the warehouse receipt, is either to pay the market price thereof in money, or re-deliver the wheat, or other wheat in place of it, the transaction is not a bailment, but is a sale, and the property passes to the depositary, and carries with it the risk of loss by accident." (Syl.)
>
> *Chase v. Washburn*, 1 Ohio St. Rep. 244.

From the foregoing cases and many others which might be cited it can be seen that in the very earliest times in the oldest states in this country as well as in the Supreme Court of the United States the distinction was clearly defined between a bailment and a sale. This is a question on which there is no division of authorities. The law is, and, for a century has been well settled. The only difficulty is in determining what the facts are in a given case and applying the well settled principles of law thereto.

Point 2—Restriction on Sales

2. Where alleged consignor restricts sales which alleged consignee may make either to (1) a prescribed class of persons or (2) in a prescribed territory; or (3) for prescribed prices or (4) for cash only or (5) as to terms of credit either open account or notes, a consignment is indicated.

But where, as in the case at bar, the consignee is at liberty to sell at any price he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time the relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, but on his own account for he is to pay a price which may be different from those fixed by the contract with his customer.

Mitchell Wagon Co. v. Poole, 235 Fed. 817;
In re Penny & Anderson, 176 Fed. 141;
Taylor v. Fram (C.C.A.) 252 Fed. 465, 40 A. B. R. 377;
In re Leflys, 229 Fed. 695, 36 A. B. R. 306;
Chickering v. Bastress et al. (Ill.) 22 N. E. 542;
In re Rabenau, 118 Fed. 471;
Newmark on Sales, Sec. 23;
Weston v. Brown, 53 N. E. 36;
In re Martin-Vernon Music Co., 132 Fed. 983 (p. 984);
In re U. S. Electrical Supply Co. (Ill. D. C.) 2 Fed. (2d) 378;

In re Agnew, 178 Fed. 478, p. 481, 23 A. B. R. 360;

In re Higrade Electric Store (So. Dist. Cal. 1924) 3 A. B. R. (N.S.) 78;

Miller Rubber Co. v. Citizens' Trust, etc., Bank, In re Newerf's Estate, 233 Fed. 488, 147 C. C. A. 374, 37 A. B. R. 542.

Point 3—Return of Goods on Termination of Contract

This contract provides:

"*Seventh*: Either party to this agreement may terminate the same by giving to the other three days' written notice of its intention to terminate the same, and at the termination thereof all goods in possession of the party of the second part belonging to the party of the first part shall be returned to the party of the first part.

"*Eighth*: The party of the first part shall have the right to check up and inspect and/or to withdraw any part or all of the said merchandise at any time without notice to the party of the second part."

These provisions of the contract are consistent with a consignment but are also consistent with the sale of goods on credit with reservation of title as security for the purchase price. Hence of no value in determining a controversy of this nature.

Points 4, 5, 6—Reports of Sales—Reservation of Title to Proceeds of Sales and Accounting

Where sales are reported at stated intervals by agent to principal giving names and addresses of purchasers, sales prices, terms, etc.; where title is re-

served in principal to any moneys, accounts, notes, etc., resulting from sales, as trust funds; where there is accounting, at stated intervals, by agent to principal, for all proceeds of sales, either turning cash, notes and accounts over to principal or making other satisfactory accounting therefor, a consignment is indicated.

But where there is a total absence of such reports, or, as in the case at bar, a bare report of sales, without any details as to identity of the purchasers or sales prices or terms, or a failure by alleged consignee to insist upon compliance with such a provision; where as in the case at bar, there is a total absence of reservation to principal of title to the moneys, accounts or notes arising from sales, or failure to insist upon compliance with such provision; where the alleged agent merely makes payment, from time to time, to alleged principal of money, in lump sums, similar to payments made to other creditors the transaction is not a bailment. The relation is not that of principal and agent. The transaction is a conditional sale; and the relation is that of debtor and creditor, at least, in so far as the rights of subsequent creditors are involved.

Points 7-8—Separation of Goods and Proceeds of Sales

Where alleged consigned goods are kept separate from other goods of the bankrupt it is an element pointing to a bailment.

But where, as in the case at bar, the goods were mingled with the other goods of alleged consignee, without distinguishing marks sufficient to identify the

woolens sent by defendant from other goods on the shelves, this condition gave House of Irving all the indicia of ownership so far as the public was concerned, and points to a sale on credit. The contract provided that the merchandise should be kept separate from other merchandise on the premises. But that was not sufficient where there was nothing to distinguish the Kemp-Booth merchandise from the other merchandise, to the public.

Flanders Motor Co. v. Reed, 220 Fed. 642, 33 A. B. R. 842;

In re High Grade Elec. Store, 3 A. B. R. (N.S.) 78;

Miller Rubber Co. v. Citizens Trust, 37 A. B. R. 542;

Taylor v. Fram, 252 Fed. 465, 40 A. B. R. 377.

Where alleged consigned goods as well as proceeds of sales of same are kept separate from other goods and other moneys of alleged consignee the relation of bailor and bailee is indicated. Such was the case of

John Deere Plow Co. v. McDavid, 137 Fed. 802;

Franklin v. Stoughton Wagon Co. (8th C. C. A. 1909) 168 Fed. 857;

Ludvigh v. Amer. Woolen Co., 231 U. S. 552, 58 Law Ed. 345;

In re King, 262 Fed. 318;

General Electric Co. v. Brower, 221 Fed. 597.

On the other hand where, as in the case at bar, the alleged consigned goods were mingled with other goods of alleged consignor and proceeds of sales of

alleged consigned goods mingled with the other moneys of alleged consignee, with knowledge of alleged consignor; remittances made to alleged consignor out of these mingled moneys; also other creditors and expenses of business paid out of said mingled funds, the relation of debtor and creditor is indicated.

It is an inevitable incident to a valid consignment contract that the proceeds of sales of consigned goods shall be kept separate and apart, and not intermingled with the proceeds from sales of other goods of the consignee. This is an irrevocable result of the relationship of principal and factor, the principal retaining control of the goods and of the proceeds therefrom, and paying its factor a commission.

In re U. S. Electrical Supply Co. (D. C. Ill.) 2 Fed. (2d) 378, 5 A. B. R. (N. S.) 319;

In re Agnew (D. C. Miss.) 178 Fed. 478, 23 A. B. R. 360;

High Grade Elec. Store, 3 A. B. R. (N. S.) 78;

In re Shiffert (D. C. Penn.) 281 Fed. 284;

Schultz as trustee v. Wesco Oil Co., 149 Wash. 21;

Flanders Motor Co. v. Reed, 220 Fed. 642; 33 A. B. R. 842;

In re Penny & Anderson, 176 Fed. 141;

Adriance et al. v. Rutherford, 23 N. W. 718;

In re Wells, 140 Fed. 752;

Taylor v. Fram (C. C. A. 2d Cir. 1918) 252 Fed. 465, 40 A. B. R. 377.

Point 9—Notice to Public or Secrecy

Where business is done by consignee *openly* as agent of consignor, and the public generally, customers and other creditors are given notice by signs on premises, stationery, bill heads and correspondence and/or an instrument of record gives constructive notice, it indicates a consignment.

General Electric Co. v. Brower, 221 Fed. 597.

But where, as in the case at bar, the agreement is secret; the public not given either actual or constructive notice; and the alleged consignee deals with the public, customers and other creditors as though the alleged consigned goods were his own, and alleged consignor acquiesces, a sale is indicated. The authorities already quoted support this proposition. We do not repeat them here.

Points 10-11—Sales Price and Commission

Where the agent sells goods for a price fixed by his principal, and he has no discretion as to fixing price or terms of credit, retains for his compensation a commission on actual sales and remits the balance of moneys collected to his principal, it indicates a bailment.

But where the alleged consignee sells for any price he sees fit; where he has to pay alleged consignor a fixed price for the goods sold; where he determines the terms of credit he will extend, and to whom credit will be extended; where he pays for the goods sold at stated intervals, regardless of whether or not he has collected the purchase price; where, if he sells

for more or less than the price he has to pay the alleged consignor, he enjoys the profit or bears the loss; where, if a credit customer does not pay, he stands the loss; where he has the right at any time to pay the stipulated price for the goods and acquire title thereto—such a relationship is that of debtor and creditor upon an agreement for special terms of credit. *It amounts to this. The debtor has complete dominion over the goods. He is bound to pay a stipulated price for them on the happening of a future event; namely, a resale or use by him. Title is reserved in creditor in such a case as security for the purchase price and fire insurance is required to make doubly sure.*

Granite Roofing Co. v. Casler, 46 N. W. 728;
Buffum v. Descher, 96 N. W. 352;
In re Linforth, Fed. Cas. 8369.

The courts often declare such contracts as mere contrivances to secure the purchase price to the vendor and fraudulent as to the other creditors of the vendee.

In re Roellech (D. C. Ore.) 223 Fed. 687; 35 A. B. R. 164;
In re Rasmussen Estate (D. C. Ore.) 136 Fed. 704;
In re Carpenter, 125 Fed. 831;
In re Zephyr Merc. Co., 203 Fed. 576.

Point 13—Burdens of Ownership

Where the alleged consignor bears the burdens of ownership such as freight, expressage, taxes, insurance, depreciation and assumes the risks of fire, theft, bad credits and losses from sale below original invoice

the relation of consignor and consignee is indicated.

Sturm v. Boker, 150 U. S. 312, 37 Law Ed. 1093, 14 Supreme Court Rep. 99.

But where, as in the case at bar, the alleged consignee is required to bear some or all of these burdens and lossses it is evidence indicating a sale. Here Irving paid for fire insurance and assumed the risks of theft, and bad credits and loss from sales below cost of manufacture.

If Ambiguous the Contract Must be Construed Against Appellant

This contract was drafted by appellant, and is therefore to be construed most strongly against defendant.

> "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter * * *"
>
> Williston, Contracts Vol. II, Sec. 621, pp. 1203, 1204;
>
> *In re Eighth Ave.*, 82 Wash. 398 (402), 144 Pac. 533, which states:
>
> "While parol evidence is seldom permitted to contradict a written contract, when the contradiction appears in the written evidence itself, the matter should be resolved most strongly against the party at whose instance the words were used."

Vol. I, Meacham on Sales, Sec. 46, says:

> "In doubtful cases, however, moreover, these

ambiguous contracts are construed most strongly against their framers, if such a construction is necessary to protect the rights of others. As remarked in one case of such a contract: 'In view of its uncertainty and contradictory provisions, the court will see that third persons are not prejudiced by its construction'." Citing *Arbuckle v. Kirkpatrick* (1897) 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285.

The Parties Did Not Operate Under the Contract as Consignor and Consignee

1. The terms of the contract were not workable under the circumstances of the parties. In practice the contract was utterly ignored in almost all of its principal provisions.

> "Whether the transaction was a bailment or a sale will not be determined solely by the words employed in the written instrument. Its meaning being doubtful, the court will look also to the acts and circumstances of the parties, especially to the construction which they, themselves, put upon the contract, in executing it. The real characteristics of a sale or their legal effects are not changed by calling it a bailment. The court will look to the purpose of the contract rather than to the name given it."
>
> *Samson Tire & Rub. Co. v. Eggleston* (C. C. A. 5th) 45 Fed. (2nd) 502, 504.

2. By its terms, the contract, Paragraph Ninth, authorizes House of Irving to sell the alleged consigned goods. But it was never the intention that

House of Irving should do so. In fact, it was expressly agreed that he could not resell the goods. The provision was a nullity *ab initio.*

3. By its terms, the contract Paragraph Tenth, authorizes House of Irving to manufacture the alleged consigned merchandise up into clothing for sale and "title to such garments shall remain" in Kemp-Booth Co., Ltd. Upon sale, House of Irving to receive for its services and expenses in making up such garments such part of the selling price as shall exceed the sale price of the consigned merchandise used therein, as well as the usual commission on such merchandise.

4. No provision is made for transferring from House of Irving to Kemp-Booth Co. of title to the trimmings, linings, buttons, labor, etc., which are necessarily added to the cloth to constitute a tailor-made suit.

5. When a piece of cloth containing 3 1/3 yards is cut up into a dozen or two dozen pieces to conform to size and build of a particular man, the identity of that cloth as a suit pattern is lost. It cannot be used as a rule for any other man. Its value is practically *nil* for any purpose except to be built into a suit for the one man whom such a suit will fit. After such cutting the cloth manifestly could not be returned to Kemp-Booth Co. The linings and other trim, except buttons, are likewise cut into small pieces which become valueless upon such cutting unless they are built up with the cut out pattern into a finished coat, vest and trouser or overcoat, as the case may be.

6. Title to these trimmings, linings, buttons, thread, etc., can not "*remain*" in Kemp-Booth Co.

unless title should somehow *vest* in Kemp-Booth Co. It cannot *vest* in Kemp-Booth Co. unless it is *transferred to* Kemp-Booth Co. from House of Irving. The contract does not provide for such transfer.

7. But the actual fact is that the cloth, trimmings and linings were cut up and assembled into finished clothing in every case pursuant to a *special contract* between the House of Irving, on the one side, and one of its customers, on the other, *to manufacture* said suit, out of raw materials, exhibited to the customer, with an implied warranty—if not expressed warranty,—that these raw materials belonged to House of Irving, and that House of Irving could and would transfer good title to such finished clothing to the customer upon their being completed. The terms of payment were a matter of contract entirely between House of Irving and its customer.

8. These terms were never submitted to Kemp-Booth Co. for its approval, nor was there any such thing required by the contract. Kemp-Booth Co. acquiesced in House of Irving's conduct of this alleged consignment in this manner, with full knowledge thereof, during the entire life of the contract. Kemp-Booth Co. manifestly entered into the agreement with full knowledge of House of Irving's method of doing business. And the law will presume that Kemp-Booth Co. never intended that every sale made by House of Irving after the making of this contract should be fraudulent as to the vendee. Hence, Paragraph Tenth of the contract was not workable; was not adaptable to the circumstances of the case and the necessities of the business; did not state the true

intent of the parties; was a sham and a fraud upon every customer and every subsequent creditor of House of Irving from its inception; it was a cloak to conceal from other creditors a secret contract of conditional sale which the parties did not want these customers and creditors to know about.

9. No secret lien was reserved or could be lawfully reserved to Kemp-Booth for the price of its cloth against the finished suit since such lien would be a fraud upon the customer unless called to his attention and he assented thereto.

10. It is clear then that this entire contract was conceived, and planned as a sham to cover up another and entirely different agreement. Kemp-Booth Co. had for many years sold large quantities of goods to House of Irving upon credit, and desired to continue to sell goods to House of Irving. But the credit of House of Irving had declined to such an extent that the corporation was actually insolvent, and this was known to the officers of Kemp-Booth Co. The latter did not deem it safe to extend credit longer to House of Irving for Three Thousand Dollars, the amount of credit that House of Irving desired. This alleged consignment agreement was resorted to as an expedient for the occasion. By it Kemp-Booth Co. would enjoy the profits of the business of House of Irving without incurring any of the dangers involved in extending credit to a failing, if not already insolvent, concern. If House of Irving retrieved its losses and continued to operate Kemp-Booth Co. would profit thereby. If House of Irving should eventually fail in business, Kemp-Booth Co. would reclaim its goods and sustain

no loss. It was a very attractive arrangement for both parties. Had the contract been recorded or actual notice given to subsequent creditors it would have been good perhaps as between the parties and existing creditors.

11. But such notice, actual or constructive, would have at once destroyed the credit of the House of Irving and given notice of its insolvent condition. Hence the necessity for secrecy.

12. It is doubtful if a valid consignment agreement could be drawn to cover the facts of this case and serve all the hidden purposes of the parties.

13. Whatever the contract is, it is certainly not a consignment, for the sale of goods by an agent for his principal.

14. It is certainly not a bailment for the manufacture of cloth into clothing for the bailor.

IN CONCLUSION

Considering the previous relations of the parties, and the insolvent condition of the House of Irving, it is evident that the agreement is a cloak to conceal from subsequent creditors and other existing creditors a conditional sale of goods on credit accompanied by a reservation of title in vendor as security for the purchase price.

Summary of Elements of Consignment Lacking

The public had no notice either actual or constructive of the agreement. The vendor here clothed the vendee with all the indicia of ownership of the goods. The title to the goods passed from Kemp-

Booth Co. to House of Irving and from House of Irving to the customer. The conduct of the parties shows none of the requirements held by the courts to be earmarks of the relation of principal and agent such as restrictions of sales as to class of persons, territory, prices, terms or credits; reports on sales giving names and addresses of purchasers, sales, prices, terms, etc.; reservation in principal of title to any moneys, accounts or notes resulting from sales, as trust funds held by agent for his principal; accounting at stated intervals by agent actually turning over to principal cash, notes and accounts, or making other satisfactory accounting therefor; segregation of alleged consigned goods from other goods in the premises belonging to bankrupt with distinguishing marks which will give notice to the public of the ownership by the alleged consignor; segregation of moneys, accounts and other proceeds of sale of alleged consigned goods from the other moneys, accounts, etc., of bankrupt at all times so that there is no commingling of trust funds with the moneys of bankrupt; transaction of business by alleged consignee *openly* as agent of alleged consignor and other actual notice to the public generally, customers and other creditors especially subsequent creditors of the relationship by signs on the premises, stationery, bill heads, correspondence and/or constructive notice by a recorded instrument; control by the alleged principal of the price and terms of credit to be extended; remittance of actual moneys collected, less an agreed commission to be deducted therefrom by the agent for his services; enjoyment by the alleged consignor of

all profits from the business and bearing all losses as well as such burdens of ownership as freight, insurance, depreciation, fire, theft, bad credits and losses from sale below original invoice or cost price.

Summary of Elements of Sale Present

But on the contrary the conduct of the parties is consistent only with the theory that their *actual* relation behind this *written cloak* was that of debtor and creditor; bare reports of goods used but no details as to prices, terms, purchasers, or moneys collected; no reservation of proceeds of sales as trust funds; no accounting for proceeds of sales, merely a check up on stock to confirm correctness of reported consumption of goods; no turning of actual moneys or notes or accounts over to alleged principal, merely payment of lump sums of money similar to payments to other creditors; complete secrecy maintained as to claimed consignment; no control by Kemp-Booth Co. of sales price of clothing or terms of credit extended to customers; no remittance of actual collections less an agreed commission—in fact, no commission was ever agreed upon at all. The alleged consignee enjoyed all profits of the business, if any, and bore all losses as well as all the burdens of ownership such as insurance, depreciation, fire, theft, bad credits and losses from sale below invoice or cost price.

In short House of Irving bought these goods under an agreement by which *time of payment was dependent on use of the goods* and title was reserved in vendor as security for the purchase price. To call such an arrangement as this a consignment is a misuse of words. This sham agreement should be torn

away by the court and the true agreement exposed as a fraud upon subsequent creditors.

We are aware that we have not discussed each individual case cited by the appellant. We have refrained from doing so for the reason that such a discussion would prolong this brief to an improper length, but we call the court's attention to the fact that in the great majority of cases involving the question of validity of consignments cited by appellant the transaction was either a consignment for sale or a sale outright. While in the case at bar the transaction was an attempt secretly to consign merchandise for future consumption or use, and the issue squarely before the court in this case is whether a secret consignment of goods for consumption by the consignee can be made in Washington. The trial court was of the opinion that such a consignment can not be made, and that the attempt to do so, evidenced in this case, was, in reality, a sale.

We respectfully submit that the judgment of the trial court is right and should be affirmed.

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